IN THE

Supreme Court of the United States

October Term, 1978

No. 78-317

DUPONT GLORE FORGAN INCORPORATED, THE HOME INSURANCE COMPANY, MONSANTO COMPANY, REYNOLDS SECURITIES, INC., SCHENLEY INDUSTRIES, INC., and SWIFT & COMPANY, on their own behalf and on behalf of all others similarly situated,

Petitioners,

—against—

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, THE BELL TELEPHONE COMPANY OF PENNSYLVANIA, THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY, THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND, THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA, THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA, CINCINNATI BELL, INC., DIAMOND STATE TELEPHONE COMPANY, ILLINOIS BELL TELEPHONE COMPANY, INDIANA BELL TELEPHONE COMPANY. MICHIGAN BELL TELEPHONE COMPANY, THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY, NEW JERSEY BELL TELEPHONE COMPANY, NEW YORK TELEPHONE COMPANY, NORTHWESTERN BELL TELEPHONE COMPANY, THE OHIO BELL TELEPHONE COMPANY, PACIFIC NORTHWEST BELL TELEPHONE COMPANY, PACIFIC TELEPHONE AND TELEGRAPH COMPANY, SOUTH CENTRAL BELL TELEPHONE COMPANY, SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, SOUTHERN NEW ENGLAND TELEPHONE COMPANY, SOUTHWESTERN BELL TELEPHONE COMPANY, and WISCONSIN TELEPHONE COMPANY,

Respondents.

REPLY BRIEF FOR PETITIONERS

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v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*,

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REPLY BRIEF FOR PETITIONERS

Respondents' brief in opposition to our petition attempts to bury the important legal questions presented for review by presenting a maze of supposedly controverted facts and suggesting that petitioners merely seek to relitigate those facts. In truth, the petition scrupulously cites and adopts the District Court's findings of fact and challenges only the ultimate conclusions to be drawn. We, therefore, submit this brief reply to correct certain misleading statements in respondents' brief and to summarize the reasons why this Court should grant certiorari and reverse.[1]

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[1] We need not address respondents' rehash of their time-worn refrain concerning petitioners' claim based upon the Excise Tax Reduction Act of 1965. The petition requires no amplification here on this point.

I.

A tacit intra-corporate conspiracy was established by proof that AT&T had recommended a uniform Centrex rate structure to its subsidiaries, knowing the subsidiaries customarily followed its advice, and that the subsidiaries uniformly adhered to AT&T's rate structure recommendation even concerting their response to complaints by subscribers.

Cutting through the detail of evidentiary facts, it is clear that the District Court made the following basic findings:

> —AT&T and the operating companies, at least two of which are not majority owned[2] by AT&T and are nominally independent, had developed an established working relationship, prior to the events in suit, in which the operating companies relied upon AT&T for advice and customarily followed its recommendations (11a);
>
> —AT&T recommended to the operating companies with respect to Centrex service that they all adopt and, following the passage of the Excise Tax Reduction Act of 1965, they all maintain a uniform "package" rate structure for Centrex service (37a, 38a-39a);
>
> —All 23 operating companies adopted the uniform rate structure recommended by AT&T and adhered to it for some 6 years after the Reduction Act's passage —even concerting their response to customer complaints —until AT&T changed its recommendation, whereupon all 23 operating companies with alacrity abandoned the package rate (16a-17a, 38a, 39a-40a and n. 58).

[2] AT&T owns 26% of the capital stock of Cincinnati Bell, Inc., and 18% of the capital stock of Southern New England Telephone Company (11a and n.12).

We submit that these key findings required the conclusion that defendants agreed to a uniform Centrex rate structure absent evidence that each of the operating companies independently decided not to separate Centrex rates before 1971. The District Court, instead, found that the historic and ongoing relationships among AT&T and the 23 operating companies—the "Bell System"—weighed against a finding of agreement on the issue of Centrex rate structure. Thus, while accepting petitioners' undisputed proof of AT&T's recommendations to each defendant operating company (38a-39a) and of each operating company's submission and conformity to AT&T's position (39a), the court nonetheless excused this obviously concerted conduct, emphasizing that AT&T, pursuant to license agreements, routinely provides advice to the operating companies which routinely follow that advice. (50a-51a). We submit that this established pattern of recommendations offered and accepted facilitated and formed a part of the agreement proven rather than, as the court found, excused or negated it. Indeed, ongoing ties among defendants obviated the need for, and the likelihood of, an express commitment designed to achieve an agreement. An unambiguous suggestion of uniform conduct, as seen here suffices. Yet the District Court's decision endows the Bell System with a shield against antitrust liability.

Similarly, the District Court's conclusion gives solace to entities desiring to evade Sherman Act liability. Without risking a finding of agreement under the Sherman Act, a controlling and influential parent may "recommend" uniform conduct to its subsidiaries and even to its nonmajority owned affiliates, and the latter are now privileged collectively and uniformly to adopt the recommendations with impunity. Such an evasion will be available to any group of persons or companies that has evolved—or de-

cides to evolve—the custom of deferring to the "recommendations" of a dominant or influential leader. To sanction such an easy escape from the "intra-corporate conspiracy" doctrine, *see Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 598 (1951), is to vitiate the doctrine itself.

In the face of the undisputed evidence of parallel conduct by 23 defendants over six years and of repeated communications among them about the very issue of Centrex rate structure, the District Court did not receive or require evidence of independent decision-making by the operating companies on the issue of Centrex rate structure to rebut the inference of agreement. Not a single operating company employee testified as to why his company decided not to separate Centrex rates. The District Court nonetheless found that each company acted independently, merely attributing to each the reasons underlying AT&T's recommendation against separation—with no proof at all that such reasons were ever at the time communicated to, or considered by, the operating companies.

We do *not* say respondents were obligated to call a witness from *each* of the 23 operating companies (Resp. 17). But we do say that respondents having elected not to call even one single witness with knowledge of the central factual issue, the record established but one reasonable inference: the operating companies uniformly adopted the package rate structure because AT&T had recommended that they do so, and respondents had a tacit understanding—their "normal working relationship"—that AT&T's recommendations would be followed. *See Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208, 226 (1939). In short, our claim is that the undisputed facts—those that by respondents' election stand undisputed on the

record—establish an agreement in violation of Section 1 of the Sherman Act.

Respondents argue that the District Court properly applied these legal principles to the facts at hand (Resp. 16-17). We concede that, in the first part of its opinion, the District Court properly recited the "hornbook" law (22a-25a). But in applying the law to the facts of this case and concluding no agreement was established, the District Court departed from its own stated principles. The resulting precedent, now adopted by the Second Circuit, places an almost impossible burden of proof on antitrust plaintiffs. This Court should reverse.

II.

State regulated monopolists may not, consistent with the Sherman Act's rule of reason, agree upon a uniform, nationwide rate structure for the purpose of avoiding the costs of state regulation.

Respondents, while arguably showing that it would have been reasonable for any one operating company to adopt either the package rate structure or an unpackaged rate structure, failed to establish any substantial reason justifying the agreement by *all* operating companies uniformly to adopt and maintain the package rate structure, knowing that petitioners would thereby be saddled with substantial additional excise taxes. Here again the issue presented concerns not disputed fact findings, but rather conclusions of what is and is not a reasonable justification for respondents' nationwide agreement.

Respondents, so the District Court found, agreed to maintain nationwide the package rate structure to avoid the costs of state regulation, including the cost of prepar-

ing and filing new tariffs and the cost of defending the rate challenges which respondents expected to ensue (Pet. 9 and Resp. 12, 21).[3]

This Court should address the question of whether such a desire to avoid the costs of regulation may justify as reasonable under the Sherman Act an agreement among regulated monopolists. While this question is novel, we note that not even the express approval of a practice by a state regulatory commission can justify a restraint of trade otherwise proscribed by the Sherman Act. *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976). *A fortiori*, we submit, respondents' desire to avoid reactivating the state regulatory process altogether—the very process which legitimized respondents' monopoly power over petitioners —cannot possibly justify their agreement.[4]

The fact that each operating company was subject to state regulation individually does not argue for a relaxed application of the Sherman Act to the interstate agreement among the operating companies as a group (Resp. 19-20). Each state authority might have been perfectly well able to discharge its "responsibilities" (Resp. 20) of reviewing and regulating the rate structure of the single operating company subject to its jurisdiction. But none

[3] Contrary to respondents' statement (Resp. 12), we do not here challenge the District Court's finding that respondents did not fear the merits of the expected rate challenges. We rely on the District Court's findings that defendants desired to avoid the costs of regulation and viewed "the ultimate outcome" of the expected rate challenges as "uncertain" (Pet. 43a).

[4] Respondents understandably shy away from the other purported justification for uniformity: a desire to impose upon the customers respondents shared in common a uniform Centrex rate structure to avoid complaints and confusion (Pet. 20, 37a). If the existence of common customers were sufficient to justify agreements on uniform rate structures among companies that have no other reason for such uniformity, we would have not a rule of reason but an invitation to conspiracy.

had responsibility for ferreting out and reviewing any agreements existing among the operating companies to adopt a given rate structure nationwide. And none had the responsibility to perceive and safeguard the limited elements of competition among regulated monopolists. This was and is the responsibility of the federal courts—one which this Court should, we respectfully submit, address by granting the petition.

III.

The *per se* rule against price fixing should apply to respondents' rate structure fixing agreement.

Respondents contend that petitioners' argument for application of the *per se* rule "founders on the admitted fact that the alleged agreement did not have the effect of fixing the price of Centrex service" (Resp. 21). To the contrary, the agreement had the effect of fixing and stabilizing the rate structures of the operating companies, which structures directly affected the prices paid by petitioners for Centrex service. Because Centrex rates were packaged, petitioners paid a price inflated at least by the amount of the excise tax that otherwise would not have been imposed—upwards of $30 million. This Court should decide the clear legal issue of whether respondents' agreement is within the *per se* rule as one having "the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity." *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940).

Respondents also resist application of the *per se* rule on the ground that the courts do not yet have sufficient experience with the "business relationships" implicated in the violation (Resp. 21). Here the business relationship involved is the Bell System. The respondents' "normal

working relationship" as affiliated members of the Bell System both facilitated the Sherman Act violation and, we submit, justified it in the eyes of the District Court (Pet. 17-18).

By now, the courts have had more than enough familiarity with respondents' relationship within the Bell System to address the application of the *per se* rule to the fruits of that relationship: the uniform pricing practices followed by all respondents. May the "Bell System" companies, because they are not horizontal competitors, adopt pricing practices on a uniform, nationwide basis, or must each operating company truly conduct itself as an independent entity in making pricing decisions—as distinguished from technological ones? This petition presents an opportunity for this Court, in the context of a well-developed record presenting a specific and limited context for analysis, to begin to address the issues raised by the application of the Sherman Act to the Bell System. We urge the Court to do so.

The conspiracy presented by this record—an agreement among non-competing state monopolists to adopt uniform nationwide pricing policies—may not be one commonly encountered in Sherman Act jurisprudence. Yet its substance and effect are within the scope of the Sherman Act: a restraint of trade—a restraint upon the rate structure of each operating company—which knowingly and substantially damaged respondents' customers without any reasonable justification. The relative novelty of the restraint should not preclude the application of the Sherman Act to it. Let the flexibility of the Act match the ingenuity of the conspirators.

CONCLUSION

For the reasons cited above and in the petition, we respectfully ask this Court to grant certiorari, and, upon that grant, to reverse the judgment below and to remand the case for a determination of damages.

New York, New York
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Respectfully submitted,

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